Supreme Court, U.S.
FILED

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No._____

IN THE
Supreme Court of the United States

MIGUEL JIMINEZ,
Petitioner,

v.

DOUGLAS M. VAUGHAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner entered a guilty plea to robbery charges in Virginia state court and waived his right to appeal. Petitioner expressed dissatisfaction with the length of his sentence and alleged that the prosecutor had violated a use immunity agreement. Petitioner's attorney filed a motion for reconsideration of sentence, but did not consult with Petitioner about his right to appeal and failed to note an appeal.

The question presented is whether the standards set forth in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply in a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 alleging ineffective assistance of counsel under the Sixth Amendment for failure to file an appeal and, if so, mandate relief in Petitioner's case.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 6

I. This Court's *Roe v. Flores-Ortega* Decision Needs to Be Clarified 7

II. The Lower Courts Are in Conflict on How *Roe v. Flores-Ortega* Applies After a Guilty Plea Has Been Entered, Particularly When A Defendant Has Waived His Right to Appeal 11

III. The Decision Below Was Wrongly Decided as Petitioner's Counsel Was Ineffective For Failing to Note an Appeal in His Case 16

CONCLUSION 17

Appendix A– United States Court of Appeals for the Fourth Circuit opinion (August 25, 2009) . . . 1a

Appendix B– United States District Court for the Eastern District of Virginia Memorandum Opinion (June 5, 2008) 3a

Appendix C– United States District Court for the Eastern District of Virginia Order (June 5, 2008) 15a

TABLE OF AUTHORITIES

Page

Cases:

Campusano v. United States,
442 F.3d 770 (2d Cir. 2006) 15

Devine v. United States, 520 F.3d 1286
(11th Cir. 2008) 12

Gomez-Diaz v. United States, 433 F.3d 788
(11th Cir. 2005) 15

Frazer v. South Carolina, 430 F.3d 696
(4th Cir. 2005) 12

Hodge v. United States, 554 F.3d 372
(3d Cir. 2009) 13

McBride v. Weber, 763 N.W.2d 527
(S.D. 2009) 13

Nunez v. United States, 495 F.3d 544
(7th Cir. 2007), *vacated*, 128 S. Ct. 2990
(2008) 14

Nunez v. United States, 546 F.3d 450
(7th Cir. 2008) 15

Parsons v. United States, 505 F.3d 797
(8th Cir. 2007) 12

Roe v. Flores-Ortega, 528 U.S. 470 (2000) . i, passim

Strickland v. Washington, 466 U.S. 668 (1984) 7, 9, 10

Thompson v. United States, 504 F.3d 1203 (11th Cir. 2007) 13

United States v. Garrett, 402 F.3d 1262 (10th Cir. 2005) 15

United States v. Lovell, 83 Fed. Appx. 754 (6th Cir. 2003) 12

United States v. Mabry, 536 F.3d 231 (3d Cir. 2008) 13, 14

United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007) 15

United States v. Sandoval-Lopez, 409 F.3d 1193 (9th Cir. 2005) 15

United States v. Tapp, 491 F.3d 263 (5th Cir. 2007) 15

Watson v. United States, 493 F.3d 960 (8th Cir. 2007) 15

Constitutional Provisions:

United States Constitution, Amendment VI ..... i, passim

Statutes:

United States Code:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254 ..... i,1,6, 16
28 U.S.C. § 2255 ..... 12, 13

Rules:

Supreme Court Rule 13 1
Virginia Rules of Court 1:1 3
Virginia Rules of Court 5a:6 3

Petitioner, Miguel Jiminez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit was issued on August 25, 2009. (App. 1a-2a). The unreported memorandum opinion and order of the United States District Court for the Eastern District of Virginia were filed on June 5, 2008. (App. 3a-16a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the denial of Petitioner's 28 U.S.C. § 2254 petition was entered on August 25, 2009. This petition was filed within 90 days of entry of judgment. Therefore, the jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

I. Procedural History.

In 2004, Petitioner was charged in Virginia

state court with robbery, use of a firearm in the commission of a robbery, and possession of a firearm by a convicted felon. App. 3a. On September 27, 2004, Petitioner entered a guilty plea to the three counts in the Circuit Court for Arlington County, where he was represented by Exequiel R. Sevilla, Jr. App. 3a-4a. A sentencing hearing was held on April 8, 2005, and on May 2, 2005, the Circuit Court entered an order sentencing Petitioner to 28 years' incarceration and three years of supervised release. App. 4a. Petitioner's right to appeal expired on June 1, 2005, but no appeal was filed. App. 5a.

On January 4, 2006, Petitioner, through new counsel, filed a state habeas petition, alleging ineffective assistance of trial counsel for failing to perfect an appeal in his case. App. 6a. The Circuit Court held a hearing in the matter on December 14, 2006, making findings that Petitioner was not denied the effective assistance of counsel. App. 7a. On February 9, 2007, the Circuit Court entered a final order denying the state habeas petition. App. 7a. A timely appeal was filed on March 6, 2007, but the Virginia Supreme Court refused to accept the petition for review on September 4, 2007. App. 7a.

On October 17, 2007, Petitioner filed a timely federal habeas corpus petition pursuant to 28 U.S.C. § 2254. App. 7a. The District Court filed a Memorandum Opinion and Order granting the respondent's motion to dismiss on June 5, 2008. App. 3a-16a. The United States Court of Appeals for the Fourth Circuit filed an unpublished opinion on August 25, 2009, affirming the District Court's order. App. 1a-2a.

II. Statement of Facts.

Petitioner was initially represented in Virginia state court on robbery and firearms offenses occurring on March 6, 2004 by appointed counsel, Exequiel R. Sevilla. App. 3a-4a. A guilty plea to those charges was entered on September 27, 2004 in the Circuit Court for Arlington County. App. 4a. A plea agreement was entered into by Mr. Sevilla and the Commonwealth's attorney, which expressly provided by a letter dated October 1, 2004, that Petitioner would be given use immunity for matters disclosed during his interview on that date. App. 4a.

At the April 8, 2005, sentencing hearing, however, the Commonwealth's attorney offered statements Petitioner had made at his co-defendant's preliminary hearing. App. 4a. Believing that this violated the immunity agreement, counsel Sevilla moved for reconsideration of Petitioner's sentence. App. 5a. A formal sentencing order was entered on May 2, 2005, which ordered that Petitioner serve 28 years' incarceration. App. 4a. The motion for reconsideration of sentence was made a second time by Mr. Sevilla on May 3, 2005. On May 9, 2005, the Circuit Court denied Petitioner's motion for reconsideration of sentence. App. 5a. Under Virginia state practice, the circuit judge had authority over the case for 21 days after the May 2, 2005 written order (i.e., until May 23, 2005), and any notice of appeal had to be filed within 30 days of the final judgment (i.e., by June 1, 2005). App. 4a-5a; Virginia Rules of Court 1:1, 5A:6.

Petitioner terminated the services of Mr. Sevilla and hired a new attorney, Rebecca L. Marquez. App. 6a. Petitioner and his mother, Monica Jiminez, recall that they hired Ms. Marquez on or before May 16, 2005, and that Jiminez's file was delivered from Sevilla to Marquez on that date. App. 6a. The record shows that Mr. Sevilla withdrew his letter requesting reconsideration of sentence on April 19, 2005, "because Jiminez's family was hiring a new attorney." App. 5a. Petitioner testified that he wanted to appeal, that Ms. Marquez was hired for that purpose, but that she never filed an appeal for him. (JA 15-17, 20, 115).[1] Petitioner's mother testified that she hired Ms. Marquez to appeal her son's case and that she paid Ms. Marquez $2,500.00. (JA 34, 36, 116-17). Ms. Marquez denied being hired to appeal the case, claiming that she was only retained to file a motion for reconsideration in the circuit court. (JA 47). Ms. Marquez admitted, however, that she had been retained by May 16, 2005, and that she even may have been hired around April 12, 2005. (JA 47). Ms. Marquez testified about a conversation with Petitioner wherein she discussed a motion to withdraw guilty plea and a motion for reconsideration, "which would possibly preserve some sort of issue for appeal," but insisted that she was not retained to file an appeal. (JA 48, 56). Marquez also admitted that she never advised Petitioner or his mother of his appeal deadline, the effect of failing to file a timely appeal, nor did she advise him to appeal or to hire another attorney to appeal. (JA 55, 57).

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[1] All "JA" references refer to the Joint Appendix filed with Petitioner's appeal in the Fourth Circuit.

On July 8, 2005, Ms. Marquez filed a motion to withdraw the guilty plea on behalf of Petitioner. App. 6a. On July 19, 2005, the Circuit Court entered a substitution order replacing Marquez for Sevilla as Petitioner's counsel of record. App. 6a. The motion to withdraw guilty plea was never ruled upon. App. 6a. Petitioner and his mother made repeated attempts to contact Marquez about the status of his case, but Marquez would not explain anything about it. (JA 115-17). They did not become aware that an appeal had not been filed until they contacted new counsel. App. 6a. When Petitioner discovered that no appeal was pending and that his case was over, he filed a state habeas petition alleging ineffective assistance of trial counsel for failure to file a direct appeal in his case. App. 6a.

The Circuit Court in Arlington County, Virginia, conducted a hearing in the matter on December 14, 2006. App. 7a. At the hearing, the judge found that: (1) Petitioner "did not clearly direct Marquez to file an appeal"; (2) Petitioner "did not retain Marquez to file an appeal"; (3) "the evidence was insufficient to show that [Petitioner] had an intent to appeal"; and (4) "Marquez did not become [Petitioner's] counsel of record until after his time to appeal had elapsed." App. 7a. The judge did, however, acknowledge that Petitioner "wasn't happy with the sentence." (JA 82). The state judge also opined that no case required Ms. Marquez to inform Petitioner of his right to appeal or appeal deadlines. (JA 84). On February 9, 2007, the Circuit Court entered a final order denying Petitioner's state habeas petition. App. 7a. The Virginia Supreme Court declined to hear the case. App. 7a.

On October 17, 2007, attorney John E. Davidson filed a Section 2254 petition on behalf of Petitioner. App. 6a; (JA 90-96). In the petition, counsel argued that Petitioner was denied the right to effective assistance of counsel "because his attorney failed to file a direct appeal of his sentence." App. 3a. The District Court accepted the state court's factual determination that Petitioner and his mother did not make an express request to Marquez to appeal his case. App. 10a. The District Court further found that although Marquez did not consult with Petitioner about his right to appeal, this was reasonable because Petitioner had no viable grounds for appeal, Petitioner had waived his right to appeal, the record did not establish that Petitioner had the intent to appeal, and "Marquez did not represent [Petitioner] until after his time for appeal had elapsed." App. 13a. The District Court accordingly dismissed the petition. App. 14a-15a. The United States Court of Appeals for the Fourth Circuit affirmed in an unpublished per curiam opinion "for the reasons stated by the magistrate judge." App. 2a.

REASONS FOR GRANTING THE WRIT

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court delineated the standards for judging ineffective assistance of counsel claims in the context of an attorney's failure to note an appeal in a criminal case. In cases where the defendant has expressly directed his attorney to file (or not to file), the analysis is straight forward and easily applied. In other cases, however, where trial counsel fails even to consult with the defendant about an appeal, the question whether counsel has met minimal Sixth Amendment standards

is much more complex. In Petitioner's case, the United States Court of Appeals for the Fourth Circuit ruled that counsel did not act unreasonably even though she failed to consult with Petitioner about an appeal after being retained to file an appeal on his behalf. This holding is incorrect and warrants this Court's review. Moreover, the lower courts are in conflict as to when a defendant is deprived of his right to the effective assistance of counsel in such cases. This Court should review Petitioner's case to resolve this conflict and clarify the circumstances under which counsel is obligated to consult about an appeal when a defendant has pleaded guilty and waived the right to appeal as part of the plea bargain in the case.

I. This Court's *Roe v. Flores-Ortega* Decision Needs to Be Clarified.

Nearly a decade ago, the Court applied the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel based on counsel's failure to file a notice of appeal. *See Roe v. Flores-Ortega*, 528 U.S. at 477. The Court first reaffirmed prior holdings "that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* On the other hand, "a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* The exact question in *Flores-Ortega* was in between those extremes: "Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?" *Id.*

The Court answered the question it posed by first asking an antecedent question: "whether counsel in fact consulted with the defendant about an appeal." *Id.* at 478. If counsel had consulted with the defendant, then counsel would have acted deficiently "only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* If counsel has not consulted, then a second issue must be addressed: "whether counsel's failure to consult with the defendant itself constitutes deficient performance." *Id.*

Although the Court noted that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal," *id.* at 479, the majority rejected a bright-line rule that counsel must always so consult, *id.* at 480. Rather, the majority ruled that the duty to consult was imposed, as a constitutional matter, only "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* Significantly, the Court opined: "We expect that courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal." *Id.* at 481.

The Court then analyzed the prejudice component under *Strickland*. The Court acknowledged the fact that the context was unusual in that counsel's alleged deficient performance led "to the forfeiture of a proceeding itself." 528 U.S. at 483. As a consequence, the denial of an entire proceeding "demands a presumption of prejudice." *Id.* Still, a defendant must show a causal connection between counsel's deficient performance and the lack of an appeal. Thus, "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484. The Court held "that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.*

Justice Souter, joined by Justices Stevens and Ginsburg, concurred in part and dissented in part. *Id.* at 488. While joining the Court's opinion with respect to what showing of prejudice was required, Justice Souter dissented with respect to what showing was required to prove deficient performance regarding the duty to consult about the choice of appeal:

> The majority's conclusion is sometimes; mine is, almost always in those cases in which a plea of guilty has not obviously waived any claims of error. It is unreasonable for a lawyer with a client like respondent Flores-Ortega to walk away from her representation after trial

> or after sentencing without at the very least acting affirmatively to ensure that the client understands the right to appeal.

Id. at 488-89. As Justice Souter continued: "But only in the extraordinary case will a defendant need no advice or counsel whatever." *Id.* at 489. Justice Souter concluded:

> In effect, today's decision erodes the principle that a decision about appeal is validly made only by a defendant with a fair sense of what he is doing. Now the decision may be made inadvertently by a lawyer who never utters the word "appeal" in his client's hearing, so long as that client cannot later demonstrate (probably without counsel) that he unwittingly had "nonfrivolous grounds" for seeking review. This state of the law amounts to just such a breakdown of the adversary system that *Strickland* warned against.

Id. at 493. Justice Ginsburg wrote separately, concurring in part and dissenting in part: "Because the test articulated by Justice Souter provides clearer guidance to lower courts and to counsel, and because I think it plain that the duty to consult was not satisfied in this case, I join Justice Souter's opinion." *Id.* at 494.

In the decade since *Flores-Ortega* was decided, the lower courts have struggled with application of the

majority opinion. Although Justice O'Connor's majority opinion agreed with Justice Souter's approach in principle and predicted that courts would "find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal," *id.* at 481, such has not been the case. Likewise, Justice Ginsburg's confidence that defense counsel could "hardly ever" just "walk away, leaving the defendant uncounseled about his appeal rights," *id.* at 493-94, has proved to be unrealized. As shown below, the lower courts are deeply divided on the matter, particularly when a defendant has pleaded guilty and has waived his right to appeal.

II. The Lower Courts Are in Conflict on How *Roe v. Flores-Ortega* Applies After a Guilty Plea Has Been Entered, Particularly When a Defendant Has Waived His Right to Appeal.

Notwithstanding that three separate opinions in *Roe v. Flores-Ortega* assumed that a breach of counsel's duty to meaningfully consult about appellate rights following a guilty plea would inexorably lead to a Sixth Amendment violation, the lower courts are deeply divided on the issue. Even though Justice O'Connor assumed that counsel would "routinely" consult, 528 U.S. at 479, Justice Souter would find deficient performance "almost always" in such cases, *id.* at 488, and Justice Ginsburg opined that such transgressions would "hardly ever" be tolerated, *id.* at 494, the decisions of the lower courts have not borne out these assumptions.

Typical of the approach taken by the Fourth Circuit in Petitioner's case is that of the Eighth Circuit in *Parsons v. United States*, 505 F.3d 797 (8th Cir. 2007). Parsons pleaded guilty in the case and signed an agreement expressly waiving his right to appeal his conviction and sentence. *Id.* at 798. No appeal was filed by Parson's attorney despite the fact that Parsons told the attorney, "We've got to appeal this." *Id.* At a hearing held in proceedings filed under 28 U.S.C. § 2255, the attorney testified that he did not hear Parsons request an appeal. *Id.* at 799. Noting that this "Court declined to adopt a bright-line rule" in *Flores-Ortega*, the Eighth Circuit found no ineffective assistance despite trial counsel's failure to consult. *Id.* at 799-800. *Accord Devine v. United States*, 520 F.3d 1286, 1289 (11th Cir. 2008) (even where court determined that defendant and counsel "did discuss the question of an appeal," counsel did not have an affirmative duty to consult further about an appeal); *United States v. Lovell*, 83 Fed. Appx. 754, 760 (6th Cir. 2003) (even where defendant was found to "express an interest" in appealing, such interest was insufficient to establish ineffective assistance of counsel for failure to appeal).

Other courts, however, have found a breach of the duty to consult in cases factually similar to Petitioner's. Ironically, a Fourth Circuit case is illustrative. *See Frazer v. South Carolina*, 430 F.3d 696 (4th Cir. 2005). There, as in Petitioner's case, the defendant expressed "unhappiness with his consecutive sentences" after sentencing. Because such a defendant "need only demonstrate an *interest* in appealing," the Fourth Circuit held that Frazer met the initial requirement for demonstrating prejudice

under *Flores-Ortega*. 430 F3.d at 712. In many other cases, courts have ruled–on facts analogous to Petitioner's–that the defendant's right to effective counsel was denied. *See, e.g., Hodge v. United States*, 554 F.3d 372, 380 (3d Cir. 2009) (where counsel filed numerous post sentencing motions, but failed to note appeal, failure to consult about appeal was deficient under *Flores-Ortega*); *Thompson v. United States*, 504 F.3d 1203, 1206-08 (11th Cir. 2007) (where defendant expressed unhappiness about sentence and asked about appeal, counsel had duty to consult); *McBride v. Weber*, 763 N.W.2d 527, 533 (S.D. 2009) (same).

The lower courts are even more divided on the applicability vel non of *Flores-Ortega* when a defendant has waived his right to appeal following a guilty plea. A few courts eschew a *Flores-Ortega* analysis altogether. In *United States v. Mabry*, 536 F.3d 231 (3d Cir. 2008), the defendant argued that notwithstanding a knowing and voluntary waiver of the right to appeal and collateral review, the standards of *Flores-Ortega* applied where the Section 2255 claim was that trial counsel had failed to file an appeal. *Id.* at 239. The Third Circuit began its analysis of the issue by conceding: "There is admittedly some confusion in this area. This is largely due to the fact that, in a case that did not involve a waiver, the Supreme Court has given the right to appeal special significance as it relates to ineffectiveness claims." *Id.* Viewing the application of *Flores-Ortega* in this context to be an "over-expansion," the Third Circuit rejected what it considered "flawed reasoning" of the many other circuits that have so applied *Flores-Ortega*. *Id.* at 240. The *Mabry* court

concluded:

> The analysis employed in evaluating an ineffectiveness of counsel claim does not apply when there is an appellate waiver. While a defendant may be entitled to habeas relief if his attorney ineffectively fails to file a requested appeal because it is presumed to be prejudicial under *Flores-Ortega*, if that same defendant has effectively waived his right to habeas, he cannot even bring such a claim unless the waiver fails to pass muster under an entirely different test: one that examines its knowing and voluntary nature and asks whether its enforcement would work a miscarriage of justice.

Id. at 241. The Seventh Circuit ruled to like effect, before its decision was summarily vacated by this Court following a confession of error by the Solicitor General's office. *See Nunez v. United States*, 495 F.3d 544, 548-49 (7th Cir. 2007) ("Nunez's waiver must be enforced and his collateral attack dismissed whether or not his lawyer should have filed an appeal on demand"), *vacated*, 128 S. Ct. 2990 (2008). After remand, the court ruled that Nunez's ineffective assistance of counsel contention lacked merit because his counsel "honor[ed] his client's written choice (the waiver) rather than his client's oral second thoughts." *Nunez v. United States*, 546 F.3d 450, 456 (7th Cir. 2008).

Many other courts, however, have held that the *Flores-Ortega* presumption of prejudice applies even

where a defendant has waived appeal as part of a guilty plea agreement. The leading case in favor of this approach is *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006). Then Circuit Judge Sotomayor, writing for the Second Circuit, applied this Court's ruling in *Flores-Ortega*, and concluded that "an attorney who fails to file a notice of appeal requested by his client is constitutionally ineffective when the client waived appeal in his plea agreement." *Id.* at 771. While acknowledging that such cases "will bestow on most defendants nothing more than an opportunity to lose," the court believed that "we do not cut corners when Sixth Amendment rights are at stake. A defendant who executes a waiver may sign away the right to appeal, but he or she does not sign away the right to the effective assistance of counsel." *Id.* at 777.

Six other circuits are in agreement with the approach taken by the Second Circuit. *See United States v. Poindexter*, 492 F.3d 263, 271-73 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007); *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1195-99 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262, 1265-67 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 791-94 (11th Cir. 2005). Given this current state of the law, this Court should take this opportunity to resolve this recurring question that has so divided the lower courts to date.

III. The Decision Below Was Wrongly Decided As Petitioner's Counsel Was Ineffective For Failing to Note an Appeal in His Case.

Judged under the standards of *Flores-Ortega* and the better reasoned cases discussed above, Petitioner was denied the right to effective assistance of counsel. The state court's rulings as interpreted by the Fourth Circuit constituted an unreasonable application of clearly established law. Likewise, there was an unreasonable determination of the facts in light of the evidence as judged by Section 2254 standards. As such, Petitioner is entitled to relief.

The record in Petitioner's case is clear on the salient points: his counsel, Ms. Marquez, was retained by Petitioner and his mother two weeks before the time for filing an appeal had expired; Petitioner expressed an interest in appealing; Petitioner expressed a dissatisfaction with his sentence and believed the prosecutor had violated his use immunity agreement; Petitioner had aggressively attempted to get the state judge to reconsider her sentence; and Ms. Marquez by her own admission did not consult with Petitioner about an appeal, even though she had reason to believe Petitioner would want to appeal. Given that Petitioner expressed an interest in an appeal and had non-frivolous grounds for an appeal, Ms. Marquez's complete failure to discuss the appeal process and appeal deadlines, or file the appeal, constituted ineffective assistance of counsel under *Roe v. Flores-Ortega*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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November, 2009

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

No. 08-7099

MIGUEL JIMINEZ, a/k/a Miguel Jiminez Gomez,

Petitioner - Appellant,

v.

DOUGLAS M. VAUGHAN, Warden, Nottoway
Correctional Center,
Commonwealth of Virginia,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. M. Hannah Lauck, Magistrate Judge. (3:07-cv-00639-MHL)

Submitted: July 15, 2009 Decided: August 25, 2009

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

John E. Davidson, DAVIDSON & KITZMANN, PLC, Charlottesville, Virginia, for Appellant. Robert F. McDonnell, Attorney General of Virginia, Benjamin H. Katz, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Miguel Jiminez seeks to appeal the magistrate judge's order* denying relief on his 28 U.S.C. § 2254 (2006) petition. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the magistrate judge. Jiminez v. Vaughan, No. 3:07-cv-00639-MHL (E.D. Va. June 5, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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*The parties consented to the jurisdiction of the magistrate judge. See 28 U.S.C.§ 636(c) (2006).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MIGUEL JIMINEZ,
Petitioner,
Civil Action No.: 3:07cv639
v.

DOUGLAS M. VAUGHAN,
Respondent.

MEMORANDUM OPINION

Petitioner Miguel Jiminez, a Virginia state inmate proceeding with counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Jiminez asserts that he suffered ineffective assistance of counsel because his attorney failed to file a direct appeal of his sentence. Respondent has filed a motion to dismiss and Jiminez has responded. The matter is ripe for disposition.

I. Facts and Procedural History

In 2004, the Commonwealth of Virginia charged Jiminez with a probation violation, and with robbery, use of a firearm in the commission of a robbery, and possession of a firearm by a convicted felon. The Circuit Court of the County of Arlington ("Circuit Court") appointed Exequiel R. Sevilla, Jr., to represent Jiminez at his underlying trial.

On September 27, 2004, Jiminez pled guilty to the three counts pursuant to a written plea memorandum.[1]

On October 1, 2004, the Commonwealth's attorney sent a letter to counsel for Jiminez, memorializing their agreement that the Commonwealth would not prosecute Jiminez for crimes which he might disclose during his interview on that same date. The Commonwealth's attorney added: "We also want to repeat that we are not making any promises to [Jiminez] regarding our recommendation at his sentencing for the crimes of March 6, 2004[,] to which he pled guilty." Letter from Andrew R. Parker, Deputy Commonwealth's Attorney, to Exequiel R. Sevilla, Jr. (Oct. 1, 2004) ("Use-Immunity Letter").

On April 8, 2005, at Jiminez's sentencing hearing before the Circuit Court, the Commonwealth's attorney offered statements that Jiminez made at his co-defendant's preliminary hearing.

On May 2, 2005, the Circuit Court sentenced Jiminez to twenty-eight years and three years of supervised release for each count.[2] Pursuant to Rule

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[1]Jiminez also maintains that he plead guilty to the probation violation. However, the written plea memorandum and the Circuit Court's sentencing orders do not reflect this. The Court, however, need not resolve this issue because it does not affect its analysis of Respondent's motion or Jiminez's Petition.

[2]The Circuit Court sentenced Jiminez to three (3) years for use of a firearm in the commission of a felony, twenty (20) years for robbery, and five (5) years for possession of a firearm by a convicted felon. Sentencing Orders, May 2, 2005, *Commonwealth*

5A:6(a) of the Virginia Supreme Court,[3] Jiminez had the right to appeal this sentence within thirty (30) days. Thus, his right to appeal expired on June 1, 2005.

On April 18, 2005, Sevilla sent a letter to the Circuit Court, moving for reconsideration of Jiminez's sentence because the Commonwealth used statements by Jiminez allegedly made under a grant of immunity.

On April 19, 2005, Sevilla withdrew his letter requesting reconsideration because Jiminez's family was hiring a new attorney. Sevilla indicated that Jiminez had asked Sevilla to stop working on Jiminez's case.

On May 3, 2005, Sevilla again requested a motion for reconsideration on behalf of Jiminez. This letter contained no explanation about why Sevilla still was representing Jiminez.

On May 9, 2005, the Commonwealth's attorney submitted its opposition to Jiminez's motion for reconsideration.

On May 10, 2005, the Circuit Court denied Petitioner's motion for reconsideration of sentence.

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of Virginia v. Miguel Jiminez, Case Nos. CR04-789, CR04-790, CR04-791. None of this time was suspended.

[3]"No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel files with the clerk of the trial court a notice of appeal...." Va. Sup. Ct. R. 5A:6(a).

On May 16, 2005, Sevilla sent a letter to the Circuit Court, arguing that the Circuit Court erred when it denied Jiminez's motion for reconsideration without holding a hearing or allowing Jiminez to reply to the Commonwealth's brief in opposition. He requested a hearing on the matter.

On June 10, 2005, the Circuit Court denied Sevilla's request for a hearing, stating that the Circuit Court was not required to hold a hearing or otherwise allow Jiminez an opportunity to file a reply to the Commonwealth's brief.

On July 8, 2005, Rebecca L. Marquez filed a motion to withdraw guilty plea on behalf of Jiminez. The record is silent as to whether the Circuit Court ever ruled on this motion.

On July 19, 2005, the Circuit Court entered a substitution order replacing Rebecca L. Marquez for Sevilla as Jiminez's counsel of record. Jiminez maintains that his mother, Monica Jiminez, retained Marquez no later than May 16, 2005, and that Sevilla delivered Jiminez's file to Marquez on May 16, 2005.

Sometime between July 8, 2005, and January 4, 2006, Jiminez retained new counsel. Jiminez retained new counsel after Marquez allegedly stopped communicating with him and he learned that Marquez had not filed a direct appeal.

On January 4, 2006, by new counsel, Jiminez filed his state habeas petition. In this state habeas petition, Jiminez raised three claims: (1) "Marquez never filed a notice of appeal or otherwise perfected an

appeal from [the Circuit] Court to the Court of Appeals" (Pet. for Writ of Habeas Corpus ("State Habeas Pet.")¶ 15, *Jiminez v. Johnson*, No. CL06-08 (Va. Cir. Ct. 2006)); (2) "Marquez failed to preserve for appeal the legal issues regarding Mr. Jiminez's sentence as well as the propriety of his guilty plea" (State Habeas Pet. ¶ 18); and, (3) Marquez "also failed to communicate properly [with Jiminez] during her presentation of him" (State Habeas Pet. ¶ 18). Jiminez amended his petition on March 20, 2006, to reflect the proper respondent.

On December 14, 2006, the Circuit Court conducted a hearing on Jiminez's state habeas petition. At this hearing, the Circuit Court found that: (1) Jiminez did not clearly direct Marquez to file an appeal (Tr. of Evidentiary Hr'g ("Tr.") 79:18-21, *Jiminez v. Johnson*, No. CL06-08 (Va. Cir. Ct. 2006)); (2) Jiminez did not retain Marquez to file an appeal (Tr. 80:9-10); (3) the evidence was insufficient to show that Jiminez had an intent to appeal (Tr. 82:5-9); and, (4) Marquez did not become Jiminez's counsel of record until after his time to appeal had elapsed (Tr.83:9-12).

On February 1, 2007, Jiminez filed a motion for reconsideration of the Circuit Court's denial of his state habeas petition.

On February 9, 2007, the Circuit Court entered a final order denying Jiminez's state habeas petition.

On March 6, 2007, Jiminez appealed the Circuit Court's decision to the Supreme Court of Virginia.

On September 4, 2007, the Supreme Court

refused Jiminez's petition for appeal.

On October 17, 2007, Jiminez filed a federal habeas petition.

On November 28, 2007, Respondents filed the instant motion to dismiss.

II. The Applicable Substantive and Procedural Constraints Upon Federal Habeas Corpus Review

This Court's power to grant relief by way of a writ of habeas is circumscribed by 28 U.S.C. §§ 2254(d) and 2254(e)(1). Under Section 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). A petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* Under 28 U.S.C. § 2254(d), a federal court may not grant a writ of habeas corpus based on any claim that was adjudicated on the merits in state court unless the adjudicated claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the

State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court has emphasized that this standard places an additional hurdle before federal habeas petitioners who now must demonstrate not only that the state court's decision was erroneous or incorrect, but also that is was unreasonable. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

III. Analysis

A. Exhaustion

"In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing, "a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *Matthews v. Evatt*, 105 F.3d 907, 910 (4th Cir. 1997); *see also* 28 U.S.C. § 2254(b) (barring the granting of habeas corpus relief unless it appears that "the applicant has exhausted the remedies available in the courts of the State"). Jiminez presented his claim on state habeas review to the Supreme Court. Therefore, he has exhausted his claims properly.

B. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court held that the Sixth Amendment[4] guarantees a criminal

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[4]The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

defendant's right to reasonably effective assistance of counsel. 466 U.S. 668, 687 (1984). In order to establish a constitutional violation based on counsel's failure to appeal, a defendant must prove that (1) counsel was ineffective, and (2) but for counsel's ineffectiveness, a timely appeal would have been filed. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000). "[A] criminal defense attorney's failure to file a notice of appeal when requested by his client deprives the defendant of the Sixth Amendment right to the assistance of counsel, notwithstanding that the lost appeal may not have had a reasonable probability of success." *United States v. Peak*, 992 F.2d 39,42 (4th Cir. 1993); *accord Flores-Ortega*, 528 U.S. at 484. Thus, to prevail on an ineffective assistance claim for failing to note an appeal, a defendant need not "demonstrate that his hypothetical appeal might have had merit," but rather only for that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486.

In this case, the Circuit Court held an evidentiary hearing on Jiminez's state habeas petition. At the evidentiary hearing, the Circuit Court made factual and legal findings as to Jiminez's ineffective assistance of counsel claim that is identical to the claim presently before this Court. Accordingly, the Court considers whether Jiminez can rebut by clear and convincing evidence the Circuit Court's finding that Jiminez did not instruct Marquez to appeal, and that Marquez acted reasonably in not consulting Jiminez about appeal.

1. **Whether Specific Instructions to File a Notice of Appeal Occurred**

Jiminez maintains that his mother hired Marquez to file a direct appeal and that he wanted Marquez to file an appeal. He also contends that his asking Sevilla and Marquez to file motions to reconsider sentencing, and his asking Marquez to file a motion to withdraw guilty plea substantiate his claim that he sought an appeal. Jiminez argues, "The combined testimony of both Mr. Jiminez and Mrs. Jiminez and the obvious circumstances of a terribly adverse ruling by the circuit judge is more than sufficient to satisfy the Petitioner's burden of proof that he hired Ms. Marquez to appeal." (Pet.'s Br. in Opp'n to Mot. to Dismiss & in Response to Rule 5 Answer 12.)

The Circuit Court found that "[i]t's not in any way clear that [Jiminez] directed Ms. Marquez ... that he wanted to appeal." (Tr. 79:18-21.) The Circuit Court made this finding based on Jiminez's testimony that he did not ask Marquez to file an appeal. In fact, when asked by his own attorney whether he discussed filing an appeal with Marquez, Jiminez responded "We discussed a motion to reverse my guilty plea." (Tr.14:5-7.) Marquez also testified that she was retained by Mrs. Jiminez to file a motion for reconsideration of sentence and never agreed to file an appeal. (Tr. 44:4-10; 53:10-17.) The Circuit Court noted that even if Mrs. Jiminez had asked Marquez to file an appeal, this would not lead to a different result because Marquez was bound to represent her client, Jiminez, and not Mrs. Jiminez.

Jiminez has not rebutted the Circuit Court's finding by clear and convincing evidence because he only presents evidence that the Circuit Court already considered. It is beyond question that Marquez could not be ineffective for failing to carry out Jiminez's desire to appeal if Jiminez never communicated this desire to Marquez. Thus, Marquez was not ineffective because Jiminez lodged no specific instruction to file appeal.

2. Consultation About Appeal

When a client has not clearly expressed her or his desire to appeal or not to appeal, the question becomes whether counsel consulted with the defendant as to an appeal. *Flores-Ortega*, 528 U.S. at 478; *Witherspoon*, 231 F.3d at 926. "Consult,"as defined by the Supreme Court, means to advise "the defendant about the advantages and disadvantages of taking an appeal, and [make] a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478. If, after consulting with the defendant, counsel does not follow her or his express instructions, counsel's performance is unreasonable. *Id.* If counsel did not consult with the defendant, the inquiry turns to whether such failure in itself was unreasonable. *Id.*

The Constitution requires counsel to consult with the defendant about an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that [she or] he was interested in appealing." *Id.* at 480. Whether the defendant proceeded to trial

or pled guilty becomes a highly relevant factor to this inquiry. *Id.* If the defendant pled guilty, the court should consider whether the defendant received the sentence bargained for in a plea agreement and whether the defendant waived some or all rights to appeal in the plea agreement. *Id.* Courts assess counsel's performance in carrying out the duty to consult under a standard of reasonableness. *Id.* at 481. When a defendant establishes that counsel's performance was unreasonable, the defendant must then demonstrate that but for counsel's deficient performance, she or he would have appealed. *Id.* at 483-84. Upon such a showing, the court presumes prejudice to the defendant. *Id.*

It is clear that Marquez did not consult with Jiminez about appeal. The Circuit Court found that Marquez acted reasonably because: (1) the record did not establish that Jiminez had the intent to appeal; (2) there was no evidence that would have overriden Jiminez's written and oral waiver of his right to appeal; (3) the record lacked evidence that Sevilla, who represented Jiminez until May 16, 2005, did not inform Jiminez about his appeal rights; and, (4) Marquez did not represent Jiminez until after his time for appeal had elapsed. (Tr. 82:5-83:12.) Also, the record does not suggest any non-frivolous ground for appeal because, contrary to Jiminez's assertions, the use-immunity agreement Jiminez entered into explicitly excises any sentencing recommendation from the agreement. *See* Use-Immunity Letter; Tr. 75:12-76:14.

Again, Jiminez directs the Court only to evidence that the Circuit Court already considered.

Therefore, Jiminez fails to rebut the Circuit Court's finding by clear and convincing evidence. The Court finds that Marquez acted reasonably in her representation of Jiminez, even though she did not consult with him about his appeal rights. There were no viable grounds for appeal, Jiminez expressly waived his right to appeal in writing and under oath in open court, Jiminez did not otherwise express an intent to appeal, and Marquez did not represent Jiminez until after his time to appeal has passed.

IV. Conclusion

For the foregoing reasons, Respondent's Motion to Dismiss shall be GRANTED. (Docket No. 4) Accordingly, the Petition (Docket No. 1) will be DISMISSED.

An appropriate Order shall issue.

/s/
M. Hannah Lauck
United States Magistrate Judge

Richmond, Virginia
Date: June 5, 2008

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MIGUEL JIMINEZ,

Petitioner,

Civil Action No.: 3:07cv639

v.

DOUGLAS M. VAUGHAN,

Respondent.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Respondent's Motion to Dismiss (Docket No. 4) is GRANTED, and the Petition for a Writ of Habeas Corpus is DISMISSED.

Petitioner is advised that he has the right to appeal this decision. If he chooses to do so, he must file written notice of appeal with the Clerk of the Court within thirty (30) days of the date on this Order. Failure to file a notice of appeal could result in loss of the right to appeal.

Let the Clerk send a copy of the Order and accompanying Memorandum Opinion to all counsel of record.

It is so ORDERED.

/s/
M. Hannah Lauck
United States Magistrate Judge

Richmond, Virginia
Date: June 5, 2008